IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

WP(C).No. 29627 of 2007(B)

OPELE.28/2005 of MUNSIFF COURT, MANJERI
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PETITIONER:

PAKKADAN SULAIMAN, S/O. MUHAMMED,
KARUVARAKUNDU AMSOM, CHERAMB DESOM, P.O. KUTTATHI.

BY ADV. SRI.T.KRISHNAN UNNI
SRI.M.M.ABDUL AZIZ (SR.)

RESPONDENTS:
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1. PULIYAKUNNAN NAZAR, S/O. ABU HAJI,
KARUVARAKUNDU AMSOM, CHERAMB DESOM, P.O. KUTTATHI,
MALAPPURAM DISTRICT.

2. THEKKETHIL SALAM, S/O. MUHAMMED,
KARUVARAKUNDU AMSOM, CHERAMB DESOM, P.O. KUTTATHI,
MALAPPURAM DISTRICT.

3. RETURNING OFFICER G 21,
KARUVARAKUNDU GRAMA PANCHAYATH, CHERAMB DESOM,
P.O. KUTTATHI, MALAPPURAM DISTRICT.

BY ADV. SRI.M.A.ABDUL HAKHIM(Sr.)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

EXT. P1 **TRUE COPY OF OP (ELECTION) FILED BY THE 1ST RESPONDENT DATED 22.10.05.**

EXT.P2 **TRUE COPY OF THE COUNTER FILED BY THE PETITIONER IN THE OP (ELECTION) DATED 31.12.05.**

EXT.P3 **TRUE COPY OF THE DEPOSITION OF THE 3RD RESPONDENT DATED 25.7.07.**

[True copy]

P.A. to Judge.

M.N. KRISHNAN, J.

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W.P.C. NO. 29627 OF 2007

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Dated this the 7th day of November, 2007.

J U D G M E N T

This writ petition is filed to set aside the order of the Munsiff, Manjeri in OP(Election) 28 of 2005 dated 4.10.07. As per the said order the learned Munsiff held that, (1) The ballot papers produced before the Court will be counted in open Court in the presence of the petitioner, respondents and their counsels at 2.30 pm on 6.10.07, (2) After counting if it is found that total ballots bundled are either 1269 or less than 1269, the blue cover with the lable postal ballot will be opened and the ballot will be taken outside and verified and further orders will be passed. (3) In addition to the blue cover as stated above all over covers will be opened and verified to see whether any other ballot paper was kept in such covers if and only if the total ballots including those in blue cover does not exceed 1269. (4) If the ballot paper in the blue cover and other ballot papers if any in other covers

added to the ballot papers produced does not exceed 1269, the election petition will be posted for final orders.

2. Now, the challenge is that such a procedure cannot be adopted by the Munsiff and he should not try to undo the democratic process by conducting a roaming enquiry which is not contemplated under law. The brief facts necessary for the disposal of the writ petition are as follows.

3. The petitioner in the election petition is the defeated candidate. He lost the election by a margin of one vote and the first respondent was declared the winner. He was contesting the election for the Grama Panchayat Ward No.1. The voters included in Part II of the voters list relating to this Ward shall have their votes in Booth No.2. One Puliyakunnan Hamza and his family members are voters in the Ward and it is further submitted that one Muneera is included in part 2 of the voters list of Ward No.1 as Sl.No.714. Even though Safiya is also included in the same voters list as Sl.No.11 by a printing mistake the name is shown as Muneera. Or in other words, the contention is to

the effect that Hamsa who is having two daughters by name Muneera and Safiya and mistakenly in the voters list the name of Safiya is also shown as Muneera. Therefore, they want to cast the votes. There was an objection and after depositing an amount of Rs.10/- as contemplated under Rule 32 of Kerala Panchayat Raj Act (Conduct of Elections) Rules, an enquiry contemplated was conducted and she was permitted to vote. As per the Rules when a person is permitted to vote it has to be put in the ballot box and not kept separately.

4. Now, the point projected in the election petition is that by mistake the said vote was put in a cover and it was never put in the ballot box which resulted in shortage of one, after all the total votes polled and that has materially affected the election results. The learned counsel for the respondent had invited my attention to S.102 of the Kerala Panchayat Raj Act. Section 102(1)(d)(iii) and (iv) may have relevance in this case. Under sub Section (iii)

> "by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or (iv) by any non-compliance with the provisions of this Act or of any rules or orders made thereunder, the Court shall declare that the election of the returned candidate to be void."

5. These are all matters which require in depth consideration at the hands of the Court where the matter is pending.

6. Now, I may refer to the documents made available before me and one of such documents is styled as the account of ballot papers and the description is G 21 1/2 which is produced as Ext.R1(a) which would show that GP 851 to 1680 are the ballot papers received by the Presiding Officer and it will further show that the unused ballot papers are GP 1459 to 1680. Thus the total ballot papers received is 830 and the unused ballot papers is 222 which will show that the ballot papers that would have been used must be 608. In paragraph 4 column (b) relates to challenge vote and the Commissioner gives the headline as cancelled votes. A

special entry is made showing it as challenged vote. So the ballot papers used must be 607 + 1, i.e, 608.

7. Now, I will refer to Ext.R1(b). In Ext.R1(b) the two parts of Kuttathi Panchayat the total number polled comes to 658 Part I, 607 Part II. Thus making a total of 1265 + the postal ballot paper of 4 which consolidates the figure of 1269. Now the contention before the Court is that the challenge vote exercised by Safiya has not been taken into consideration at all and if it is taken into consideration and as the petitioner believes that it has been cast in his favour the so called majority of one vote will not be there and therefore requested the Court to find it out. A lot of confusion had arisen and everyday the election Court has to pronounce separate order and regularly writ petitions are filed by the parties against such orders. Whatever it may be, there are confusion prevailing and a finality has to be attained. The learned counsel for the writ petitioner would strongly contend before me that the so called vote is not a challenge vote but at the most it may be a tendered vote.

The Court below has considered it as a challenge vote and at this stage this Court does not want to embark on an enquiry on that and I leave the matter there.

8. Then the learned counsel would contend that it is not a duty of the election Court to make a searching enquiry to find out what has happened to the so called challenge vote. I feel in an election petition technical contentions have got importance. But if it is the ground on which the election petition is filed and it is entertained the Court is bound to consider the subject matter and for that purpose the Court has to find out where is that document so as to consider the same. Here, in order to pronounce the judgment on the election petition the Court has to arrive at a decision,

(1) Whether there is a vote which is described as challenge vote,

(2) Whether such a challenge vote has been taken into consideration for the purpose of counting and declaring the result of the election and

(3) On whose favour such vote is exercised.

So, in order to enter into an adjudication on that point which is the subject matter of the election petition it is crystal clear that the Court has to find out where the so called challenge vote is. This is what precisely the Court below has done. Now, the Court had entered evidence and the situation is such the Court finds that there is nothing on the table to directly show the challenge vote and therefore the Court held that there is blue cover wherein the inscription of postal ballot is there, one may take it out open it and find out whether it is the vote that is under challenge in this proceedings. It is true, unlike in other cases here the whole result of the election depends upon most probably, this one vote. So when the Court is called upon to conduct an enquiry into election law the Court may have to find it out. This is what is precisely done by the Court below and I feel that the approach of the Court below in giving directions as per the order dated 4.10.07 will not in any way be against the provisions of law governing the trial of election cases. The learned Munsiff has taken precaution and held that he

has never asked the entire ballots to be separated and counted. He has only directed that the total ballots available to be counted and if it is found that it is 1269 or less than 1269 then the postal ballot will be opened. At this stage I do not want to interfere with the decision of the Court below but various other questions of law which the learned counsel for the writ petitioner has argued are still wide open and he can place it before the Court below at the time of final hearing of the election petition. Therefore, the order under challenge is confirmed and the writ petition is dismissed.

M.N. KRISHNAN, JUDGE.

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